However, that was not the end of this matter as the question of the sovereign immunity of the Commonwealth of Australia in our courts, whether exercising civil or criminal jurisdiction, was also involved in this case. Section 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided after that date. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as *The 'Parlement Belge'*.[3] That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in *The 'Philippine Admiral'*[10] was delivered by the Privy Council in November 1975, it was binding authority in so far as our courts are concerned. Therefore, by that time the common law position on sovereign immunity in this country would be that the absolute theory applied to all actions in personam but the restrictive view applied to actions in rem. When the *Trendtex* case[9] was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the common law in this country, the doctrine of restrictive immunity should also apply. That is more so in view of the very strong persuasive authority in *The 'I Congreso'* case[4] in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the actions were in rem or in personam. We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

Finally, we have to consider whether the acts complained of were done within the trading or commercial activity of the foreign state, that is, whether they were acta jure gestionis or whether the acts were within the sphere of the governmental or sovereign activity of that state, that is, whether they were acta jure imperii? We were of the view that the acts of the two Australian customs officers considered in the whole context of this case could not be classified as 'trading or commercial' (see *The 'I Congreso* case[4]) and agree with Mr Abraham that the exercise of the functions of the customs arm of the Australian government in the peculiar circumstances of this case could not be classed as acta jure gestionis, ie commercial in accordance with accepted international standards and were therefore acta jure imperii. In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agung has recognized the Commonwealth of Australia as a foreign state. In the circumstances and for the reasons stated, we therefore allowed the appeal with costs and set aside the order of the High Court dated 16 September 1988.

Appeal allowed.

Solicitors: *Shearn Delamore & Co*; *Asbir, Hira Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NO 223 OF 1986
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
8 JANUARY 1990

Civil Procedure — Enforcement of judgment — Prohibitory order — Application to set aside on ground that judgment debtor has no beneficial interest in property — Failure to lodge caveats — Sabah Land Ordinance (Cap 68), ss 94, 100, 103 & 116

Land Law — Prohibitory order — Judgment debtor ceasing to have beneficial interest in land — Land registered in name of judgment debtor sold, purchase price received and possession given to vendors — Seller bare trustee for purchasers — Failure to lodge caveats — Effect on beneficial interest of purchasers — Sabah Land Ordinance (Cap 68), ss 94, 100, 103 & 116

In this case, the respondents had obtained judgment against one Chu Yun for the sum of $120,266.35 with interest. Part of this sum was paid but the balance sum of $32,550.25 remained unsatisfied. The respondents obtained a prohibitory order against shares in two leases and this was registered against the two leases. Subsequently the solicitors for Chu Yun notified the solicitors for the respondents that their client had no more interest in the properties concerned as the properties on which flats had been built had been sold more than ten years ago. The three appellants claimed to have bought the flats from Chu Yun and to have paid the full purchase price for the flats. Although Chu Yun was the registered owner of the shares in the leases, he had sold his interests in them to the appellants, had received full payment of the purchase moneys and had allowed the appellants to enter into possession of the two units of flats. The appellants applied for the prohibitory order to be set aside on the ground that Chu Yun has no saleable interest in the land. The learned trial judge dismissed the application and the appellants appealed.

Held, allowing the appellants' appeal:

(1) Since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia, that the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers, should be equally applicable in Sabah.

(2) Although the judgment debtor was the registered owner of the shares in land comprised in the leases, he was holding the said land as bare trustee for the appellants. As Chu Yun had no beneficial interest in the said land, there was nothing which the respondent judgment creditor could legally seize and sell.

(3) The appellant's failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents as the prohibitory order could not override the beneficial interest of the appellants in the properties attached.

(4) On the facts of the case and the authorities cited, the learned trial judge should have granted the application of the appellants and set aside the prohibitory order. The appeal should therefore be allowed and the prohibitory order set aside.

[Responden di dalam kes ini telah mendapat penghakiman terhadap seorang bernama Chu Yun bagi jumlah $120,266.35 dan faedah. Sebahagian jumlah wang itu telah dibayar akan tetapi bakinya sebanyak $32,559.25 masih belum dijelaskan. Responden telah mendapat perintah larangan terhadap bahagian di dalam dua pajakan dan ini telah didaftarkan terhadap dua pajakan itu. Kemudiannya peguamcara bagi Chu Yun telah memberitahu peguamcara responden bahawa anak guaman mereka tidak lagi mempunyai apa-apa kepentingan di dalam harta itu oleh kerana harta itu di atas mana rumah pangsa telah didirikan telah dijual sepuluh tahun dahulu. Ketiga-tiga perayu mendakwa mereka telah membeli rumah pangsa itu dari Chu Yun dan telah menjelaskan harganya sepenuhnya. Sungguhpun Chu Yun masih pemilik berdaftar bahagian-bahagian dari pajakan itu, ia telah menjual semua kepentingannya kepada perayu-perayu, telah menerima harganya sepenuhnya dan telah membenarkan perayu-perayu mengambil alih milik dua unit flat itu. Perayu-perayu telah memohon perintah larangan itu diketepikan atas alasan Chu Yun tidak mempunyai kepentingan yang boleh diniagakan di atas tanah itu. Hakim yang arif telah menolak permohonan itu dan perayu-perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Oleh kerana Ordinan Tanah Sabah (Cap 68) dan Kanun Tanah Negara 1965 berdasarkan kepada Sistem Torrens, perhubungan penjual/pemegang amanah yang dikenakan di Semenanjung Malaysia, iaitu penjual selepas menerima harga pembelian tanah itu sepenuhnya dan menyerah milik tanah kepada pembeli disifatkan sebagai hanya pemegang amanah bagi pihak pembeli, hendaklah dikenakan juga di Sabah.

(2) Sungguhpun penghutang penghakiman itu Chu Yun adalah pemilik berdaftar bahagian-bahagian tanah itu yang terkandung di dalam pajakan itu, ia memegang tanah itu sebagai hanya pemegang amanah bagi pihak perayu-perayu. Oleh kerana Chu Yun tidak mempunyai kepentingan benefisial di atas tanah itu, tidak ada apa-apa yang boleh dirampas dan di jual mengikut undang-undang oleh responden sebagai pemiutang penghakiman.

(3) Kegagalan perayu-perayu mendaftarkan kaveat persendirian untuk melindung kepentingan benefisial mereka di atas tanah-tanah itu tidak boleh menyokong kes responden oleh kerana perintah larangan itu tidak boleh mengatasi kepentingan benefisial perayu-perayu di atas harta-harta yang ditahan.

(4) Atas fakta kes ini dan autoriti yang dikemukakan, Hakim yang arif seharusnya membenarkan permohonan perayu-perayu untuk mengenepikan perintah larangan itu. Oleh kerana itu, rayuan itu hendaklah dibenarkan dan perintah larangan itu diketepikan.]

Cases referred to

1 *Temenggong Securities Ltd & Anor* v *Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (folld)
2 *Karuppiah Chettiar* v *Subramaniam* [1971] 2 MLJ 116 (folld)
3 *United Malayan Banking Corp Bhd* v *Goh Tuan Laye* [1976] 1 MLJ 169 (folld)
4 *Ng Kheng Yeow* v *Chiah Ah Foo & Ors* [1987] 2 MLJ 330 (folld)
5 *Coleman* v *De Lissa* (1885) 6 NSWR (Eq) 104 (refd)
6 *Lin Nyuk Chan* v *Wong Sz Tsin* [1964] MLJ 200 (folld)
7 *Chang* v *Registrar of Titles* (1976) 50 ALJR 404 (refd)
8 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (refd)

Legislation referred to

Sabah Land Ordinance (Cap 68) ss 94, 100, 103

Appeal from: Originating Motion No 6 of 1985 (High Court, Kota Kinabalu)

Bonnie Lo (*David Wong* with him) for the appellant.
CP Robertson for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) delivering the judgment of the court: This is the second time that this appeal came before this court. It was actually heard on 9 June 1988 before me, Sulaiman SCJ and Seah SCJ. Judgment was reserved. But before judgment could be delivered certain events took place resulting in the rehearing of the appeal pursuant to s 42 of the Courts of Judicature Act 1964.

The respondents, who were plaintiffs in Kota Kinabalu High Court Civil Suit No K 486 of 1983, sued Syarikat Chemas Pemborong Sdn Bhd (first defendant), Chu Yun (second defendant), Yep My Chue (third defendant), Syarikat Pemborong Maju Satu Sdn Bhd (fourth defendant), Ho Yun Kiong (fifth defendant) and Hing Nyuk Ching (sixth defendant). On 24 January 1985, it was adjudged that Chu Yun do pay the plaintiffs, QBE Supreme Insurance Bhd, the sum of $120,266.35 with interest at the rate of 12% pa from 14 January 1983 till 24 January 1983, statutory interest at 8% pa from the date of judgment until payment and costs of $225. The balance sum of $32,550.25 together with accruing interest and costs remained unsatisfied. On 17 May 1985, a prohibitory order was obtained against Chu Yun in respect of:

(i) 1/16 undivided share of lease no 077508288 (not relevant to the appeal);
(ii) 1/20 undivided share of lease no 077516155; and

(iii) 1/42 undivided share of lease no 077508242.

(These are subject matters of the appeal)

The prohibitory order was registered against lease nos 077516155 and 077508242 on 23 May 1985 as memorial no 20186645. It was renewed on 1 October 1985.

On 25 September 1985, the solicitors for Chu Yun formally notified the plaintiffs' solicitors that 'our client has no more interest in the properties concerned. The said properties have been sold for more than ten (10) years which documentations are handled by Lo & Co. We suggest that you liaise with Peter Lo & Co for more details.'

On 15 November 1985, the three appellants took out originating motion against the respondents QBE Supreme Insurance Bhd, applying for leave to intervene in Civil Suit No K 486 of 1983 and for the prohibitory order to be set aside on the ground that Chu Yun has no saleable interest in the land comprised in Sandakan Town lease nos 077516155 and 077508242. The application was supported by the affidavits of all three appellants. After hearing the submissions of both parties, the learned judge dismissed with costs the application to set aside the prohibitory order and all subsequent proceedings and orders for sale. The appellants were dissatisfied with the decision and have appealed to this court against the decision.

The documentary evidence filed by the appellants in the court below appear to establish the following:

(i) on 17 February 1970, the first appellant entered into a sale and purchase agreement to buy one unit of flat to be erected by Chu Yun and another which flat is now known as 1/20 undivided share in Sandakan Town lease no 077516155;

(ii) on 10 October 1970, the second and third appellants entered into a sale and purchase agreement to buy one unit of flat to be erected by Chu Yun and another which flat is now known as 1/42 undivided share in Sandakan Town lease no 077508242;

(iii) that the full purchase price of the said flats had been paid to and received by Chu Yun some 15 years ago;

(iv) that the appellants had entered into and are now in possession of the said flats after they had been completed some 15 years ago;

(v) that a memorandum of transfer in the statutory form was executed by the vendors and the purchaser in lease no 077516155 in respect of the 2/20 undivided share;

(vi) that Chu Yun is the registered owner of (a) 1/20 undivided share in Sandakan Town lease no 077516155 and (b) 1/42 undivided share in Sandakan Town lease no 077508242 on 17 May 1985.

The position is clear. Chu Yun was and is still the registered owner of (a) 1/20 undivided share in lease no 077516155 and (b) 1/42 undivided share in lease no 077508242 albeit he had sold his interests in these two parcels of land to the appellants in 1970, had received full payment of the purchase moneys and had allowed the appellants to enter into possession of the two units of flats.

In Peninsular Malaysia the law is clear, viz the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers (see *Temenggong Securities Ltd & Anor* v *Registrar of Titles, Johore & Ors*[1]). In that case Ong Hock Sim FJ, speaking for and on behalf of the Federal Court, stated:

> We are in agreement with the majority view in *Karuppiah Chettiar* v *Subramaniam* [1971] 2 MLJ 116 where it was
>
> 'Held (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent (purchaser) who was the equitable owner....'

In *Karuppiah*'s case,[2] the vendor sold the land to the purchaser. A transfer was executed but not registered. On 13 November 1968, the purchaser entered a caveat. On 14 April 1969, the judgment creditors obtained judgment against the vendor and registered a prohibitory order on the property already sold to the purchaser. The High Court granted the purchaser's application to set aside the prohibitory order. The judgment creditors appealed to the Federal Court. The appeal was dismissed on the ground that the vendor, having sold his entire interest in the land and received payment in full, held the legal estate as trustee for the purchaser who became the equitable owners. The judgment creditor could only take whatever interest the debtor had. Ong CJ (Malaya) made no bones about the matter when he said:

> It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

Gill FJ was equally blunt when he asked:

> If the land cannot be sold, what is the point in allowing a prohibitory order to stand on the register?

In *Temenggong*'s case,[1] the vendor sold certain lands to the purchaser. On 14 December 1972, the memorandum of transfer was presented for registration. On 19 December 1972, the creditors lodged a prohibitory order on the said lands. So the memorandum of transfer was rejected as there was a registrar's caveat. The High Court dismissed the purchaser's application to cancel the caveat. The Federal Court allowed the appeal on the ground that the vendors having parted with the interest in the land they became bare trustees and had no interest in the land over which a caveat could be lodged. In the instant case, the learned judge took the view that the absence of a caveat was the distinguishing factor to *Karuppiah*'s case.[2] This makes no difference as a caveat does not create any legal interest in the land.

Tun Suffian (then LP) in *United Malayan Banking Corp Bhd* v *Goh Tuan Laye*[3] explained the position lucidly at p 170:

> ... possession of the titles gives them an equitable interest in the lands, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.

In the same way in *Ng Kheong Yeow* v *Chiah Ah Foo & 3 Ors*,[4] the Supreme Court held at p 332 that even though the respondent failed to lodge a caveat, it did not deprive him in having a better equity against the appellant who had lodged a caveat. The reason being that the appellant had nothing to caveat as the vendor had already sold all his interest to the respondent.

Reference was made to ss 100 and 103 of the Sabah Land Ordinance (Cap 68). Section 100 deals with registration and reads:

> If the Registrar shall decide that the document presented is in order and fit for registration, he shall, in the absence of any lawful prohibition of registration thereof and on receiving payment of the prescribed fees, endorse upon the document of title and upon the issue copy or extract from the Register a brief memorial showing the nature of the dealing and date of registration and also, except in cases of satisfaction of charge and surrender of title for cancellation, exchange or sub-division, the names of the parties and hour of registration. Every such endorsement shall be made or attested by the Registrar and shall contain a reference to the memorandum on which it is based and its serial number in the Register of Memorials:
>
> Provided that if the document presented is a judgment, order or decree issuing from any Collector of any court in Sabah the Registrar may refuse registration until the expiry of the period of appeal against such judgment, order or decree.

Section 103 deals with priority and reads:

> All memorials and memoranda shall be numbered serially in order of priority of registration. For purposes of priority the time of presentation shall be taken as the time of registration, without regard to the date of execution of the memorandum, or to any express or implied or constructive notice contained in the document:
>
> Provided that if a memorandum has been returned for correction under section 99 it shall take priority from the time it is presented afresh.

The contention of the respondents is that they have an equity and therefore they have priority. As the appellants have not lodged any caveat, the respondents argued that their failure to do so for the last 15 years affects priority. The appellants have forfeited their prior equity. Section 116 of the Sabah Land Ordinance (Cap 68) deals with caveat but it does not make the registration of caveat mandatory. If a purchaser fails to lodge a caveat to protect his equitable interest then it is a risk he must take. Both parties take the same view that the effect of a prohibitory order is the same as a caveat. But one thing is clear. Neither a prohibitory order nor a caveat creates a legal interest in land. The question here is whether there was any interest which could be attached by a prohibitory order.

At p 119 in *Karuppiah*'s case,[2] Gill FJ likened a prohibitory order to a writ of fi fa (fieri facias) of which in *Coleman* v *De Lissa*[5] Faucett APJ said at p 111:

> It seems to me that the entry of the writ of fi fa does not necessarily bind all the estate or interest that appears on the face of the certificate of title to belong to the holder of the certificate; but that all it can mean is that any subsequent dealing with the land shall take effect only after the writ so entered has been satisfied, or shall be void as against the sheriff's sale under the writ. But I do not think that any previous bona fide transaction between the registered owner and another person, although not registered, of which, at all events, the purchaser at the sheriff's sale has notice, can be affected. The interest which the sheriff can sell is still, as it was before, the beneficial interest that was in the registered owner at the time of the entry or of the sheriff's sale.

In our case, it is not the caveat which confers on the purchaser a better claim but the prior equitable interest which the purchaser obtains under the contract of sale. This equitable interest is not lost by the fact that the appellants delayed in registering their interest. The parties to the contract of sale may have breached s 94 of the Sabah Land Ordinance (Cap 68) but this does not affect their contractual rights. Section 94 reads:

> (1) Every person acquiring the possession of land or the profits thereof or any interest therein whether as purchaser or on the death of the owner, or as chargee, or otherwise, howsoever, shall give notice of such acquisition, immediately after it has taken place, to the Collector:
>
> Provided that no land shall be transferred or sub-leased except to an individual person or persons, company or body corporate such as is defined in section 10.
>
> (2) The Collector on receiving such notice shall call upon the parties concerned to comply with the requirements of this Part or shall take such action under Part VI hereof as may be required.
>
> (3) Any person neglecting to comply with the requirements of this section within three months from the date of the dealing or transfer or acquisition of interest or omitting without reasonable excuse to comply with any order of the Collector made under subsection (2) within the time stated in such order shall be guilty of an offence against this Ordinance and shall be liable to a fine of five hundred dollars and to the payment of a sum equivalent to double the amount of any unpaid stamp duties and fees payable on the dealing and registration thereof.

This section and s 88 had been the subject of judicial decision in *Lin Nyuk Chan* v *Wong Sz Tsin*[6] which involved an unregistered tenancy agreement for a period of 15 years. The observations of Wylie CJ (Borneo) who wrote the leading judgment of the Federal Court, which was concurred by Thomson LP and Wee Chong Jin CJ (Singapore), in our opinion, could apply with equal force to a legally binding and enforceable sale and purchase agreement.

Dealing with s 94, Wylie CJ (Borneo) made these observations:

> Reference was also made in the course of argument to s 94 of the Ordinance, by virtue of which the appellant should have notified the Collector of Land Revenue that he had acquired possession of these premises. The collector may then call upon the parties to register the transaction and it is an offence not to notify the collector or to comply with his requirement to register, for which punishment is provided under the section. This provision is clearly designed to compel parties to keep the register up-to-date, but it provides its own penalty and has no effect on the contractual rights of the parties as between themselves. Nor does it prohibit late registration. In my judgment, neither this section, nor the failure to comply with it, affects the issue of specific performance having regard to all the facts relevant to that issue in this case.

We agree with what had been stated by the Federal Court on the construction of s 94 of the Sabah Land Ordinance (Cap 68). In *Chang* v *Registrar of Titles*,[7] Jacobs J stated at p 411:

> It is true that a vendor at the stage of contract where the contract is enforceable by specific performance has at times been described as a trustee: see for example *Shaw* v *Foster* (1872) LR 5 HL 321; *Lysaght* v *Edwards* (1876) 2 Ch D 499 and if by that no more is meant than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner then there is no difficulty in describing the vendor as a trustee.

Jacobs J appears to support the vendor/trustee relationship if the sale and purchase agreement is enforceable by means of specific performance.

In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah if specific performance is ordered by the High Court except so far as they are precluded from doing so by statutes and none has been pointed out to us by learned counsel for the respondents. What the respondents are trying to put forward is that there are competing equities but they have not clearly stated what are their equitable interest in the land. In effect, they are saying that they have registered the prohibitory order but the appellants have not protected their interests by lodging any caveat. Therefore, they say the appellants have lost their priority.

In *Karuppiah*'s case,[2] Ong CJ (Malaya) said at p 117:

> In my opinion the answer to the first and third grounds is summed up in a short passage from the judgment delivered by Lord Wilberforce in *Chung Khiaw Bank* v *United Overseas Bank Ltd* (1970) 1 MLJ 185, 186 thus:
>
> > '... under the general law, apart from the provisions as to registration and in certain circumstances even where such special provisions exist, the judgment creditor can only take whatever interest the debtor has and ... in such a case, questions of priority and correspondingly of postponement through failure to register, do not arise.'

His Lordship had cited with approval *Whitworth* v *Gaugain* (1844) 67 ER 444, 447 in which Wigram VC said:

> 'I feel that I stated the general principles correctly in *Langton* v *Horton* 1 Hare 549 when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it.'

In *Ng Boo Bee* v *Khaw Joo Choe & Ors* (1921) 14 SSLR 90, 95 Sproule J whose decision was upheld on appeal said:

> 'I have to decide, not any question of priorities, but the question of the right of the execution creditor to seize at all. It is not a dispute between various creditors of a debtor whose land is rightly under seizure; it is an issue whether plaintiff may seize and sell another man's land because of the accident of the legal title still remaining in defendant's name at the time of seizure.
>
> I think it is very clear that only such beneficial interest as a judgment debtor possesses can be seized and that the order of attachment is an assurance affecting only such beneficial interest in the land.
>
> As counsel on both sides agreed tersely to express it, a judgment creditor may seize only what the debtor can lawfully sell. Where it is admitted, as in this case, that there is no beneficial interest in the debtor at all, no question as to priority of registration can arise.'

In our judgment, the appellants' failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents inasmuch as the prohibitory order could not override the beneficial interest of the appellants in the properties attached. Moreover, the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent or until the caveat is removed by a court order. (See *Eng Mee Yong & Ors* v *Letchumanan*[8] at p 214.)

The case of *United Malayan Banking Corp* v *Goh Tuan Laye*[3] was concerned with competing equitable interests in the land, both interests being unregistered and unprotected by caveats. But, in our case we are dealing only with the equitable interests claimed by the appellants in lease no 077516155 and 077508242. There was no question of any equitable interest being claimed by the respondent here.

One of the grounds for the learned judge's refusal to set aside the prohibitory order is that the appellants did not ask for a declaration as not all parties' rights (including Chu Yun's rights) could be adjudicated. With respect, the learned judge has overlooked the fact that there was no dispute from any party including the respondents that Chu Yun had sold all his beneficial interest to the appellants. Also, the solicitors for Chu Yun had written to the solicitors for the respondents on 25 September 1985 to say that he had no more interest in the properties concerned. There was no objection to the manner in which the appel-

lants chose to intervene. The appellants could have filed a separate action. In whatever way the matter comes before the court, the issue would be the same and the outcome of the action would be the same. It is for this reason that Gill FJ in *Karuppiah*'s case[2] remarked at p 121 that 'the courts do not encourage multiplicity of proceedings to no purpose.'

Although the judgment debtor Chu Yun was the registered owner of (a) 1/20 undivided share in Sandakan Town lease no 077516155 and (b) 1/42 undivided share in Sandakan Town lease no 077508242, he was holding the said land as bare trustee for the appellants. As Chu Yun had no beneficial interest in the said lands, there was nothing which the respondent judgment creditor could legally seize and sell. On the facts of this case and the authorities cited, the learned judge should have granted the application of the appellants and set aside the prohibitory order dated 17 May 1985. Otherwise, as Ong CJ (Malaya) pointed out in *Karuppiah*'s case[2] at p 118 that it was 'a supreme exercise in futility when it is clear beyond peradventure that under such order there is nothing which can be put up for sale'. For reasons given, we would allow the appeal and set aside the prohibitory order of 17 May 1985. The appellants are entitled to their costs both here and the court below to be taxed. The deposit is to be refunded to the appellants.

Appeal allowed.

Solicitors: *Peter Lo & Co; Skinner Lind Robertson Willie Wong & Chin.*

Reported by *Prof Ahmad Ibrahim*

Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NOS 358 AND 359 OF 1988
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
8 JANUARY 1990

Land Law — Bridging finance — Developer allowed to charge land to obtain bridging finance — Whether agreement contrary to public policy and therefore void

Companies and Corporations — Shares — Financial assistance for acquisition of own shares — Transactions void — Companies Act 1965, s 67

Banking — Guarantee — Material variations in guarantee agreements — Whether guarantors discharged

The conflict in this case arose from the proposed development of land in Kota Kinabalu, Sabah. Under the agreement, the landowners (respondents) provided the developer with the required land. In return, the landowners were to get two units of semi-detached houses for every acre of land. The developer, Kidurong, was formed and registered to carry out the joint-venture in 1980. Kidurong was to raise finance, appoint consultants and complete the housing project. The landowners transferred their interests to the developer. The second, third and fourth appellants stood as guarantors in respect of the obligations of the developer to the landowners. The landowners executed a charge over their land in favour of a finance company to enable the developers to obtain finance for the project. During the course of the project, material variations were agreed to the specifications of some of the houses to be transferred back to the landowners. The developer was unable to complete the project despite extension of time being given by the landowners. The landowners then gave notice to terminate the contracts. The trial judge found for the landowners and the developer appealed. The grounds of appeal were (1) that the learned trial judge erred in not holding that the contracts were affected or tainted with illegality by reason of public policy; (2) that the learned judge erred in not holding that the purchase of shares in the landowners' company contravened s 67 of the Companies Act 1965; and (3) that the learned judge erred in law in not applying the correct test as to the materiality of the variations.

Held, allowing the appeal of the third appellant but dismissing that of the first and second appellants:

(1) It is quite common practice in this country for a landowner to allow a developer to develop his land in exchange for a number of units of houses and to allow such developer to charge the land to the bank to provide such developer with bridging finance. There is nothing illegal about this sort of arrangement but the risk is on the landowner in the event of recession. Liability to income tax had not arisen at the time of signing the agreement. The learned trial judge was correct in holding that the agreements were valid and not tainted with illegality by reason of public policy.

(2) The appellants were correct in contending that one of the agreements is void because of the contravention of s 67 of the Companies Act 1965 in that the landowners' company had in fact given financial assistance to Kidurong to acquire the shares of the company. A transaction whereby a company assisted in the purchase of its own shares in breach of s 67 of the Companies Act